IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

THE FARMERS & MERCHANTS INSURANCE COMPANY, Plaintiff in Error, vs. FRANK DOBNEY, Defendant in Error.	No. 189. IN ERROR TO THE SUPREME COURT OF NEBRASKA.

Brief of Defendant in Error.

I

Statement of the Case.

This action was brought originally in the County Court of Holt County. From there, an appeal was taken to the District Court of Holt County, Nebraska, and trial had in that Court. The defendant in error recovered a verdict and after a motion for a new trial was over-ruled, judgment was entered on the verdict for the amount due and costs.

The Court by interlocutory order, ordered an attorney's fee of $150.00 taxed as part of the costs. This was, understand, clearly an interlocutory order and after the entry of this order the final judgment was rendered. This is an important fact to keep in mind, because we think it entirely disposes of the contention of the plaintiff in error.

II

The examination of the pleadings in the County Court, will show that no question was raised by the Insurance Company in that Court as to the validity of the Nebraska statutes, authorizing the taxation of an attorney's fee on certain iusurance contracts. By the Nebraska law if this question was not raised by the pleading in the County Court, it could never afterwards be raised in any higher Court. Unless it was raised in the County Court, it was waived and it could not be then plead in District Court on appeal. It may be proper to suggest here that on appeal from the County Court to the District Court, in Nebraska, there is a trial DE NOVO. But the case must be tried in the District Court upon the issues presented in the County Court. This is a well settled law of the state.

Bishop vs. Stevens, 31 Neb. 786.
O'Leary vs. Iskey, 12 Neb., 136.
Sawyer vs. Brown, 17 Neb: 171.
Railway Co. vs. Oglvy, 18 Neb. 638.
Ball vs. Beaumont, 59 Neb. 631.

III

In the trial in the District Court the constitutionality of the Nebraska statutes, was not drawn in question. No suggestion was made about the statute violating the equality clause of the fourteenth amendment to the Federal constitution. The interlocutory order made by the trial Court was made without objection by the Insurance Company and without any exception thereto. It is a settled law of Nebraska that unless the attention of the trial Court was called to it the question could not be raised for the first time in the Supreme Court.

Dunhan. vs. Courtnay, 24 Neb. 629.

Dayton vs. Sloan, 49 Neb. 622.

Hyde vs. Hyde, 60 Neb. 502.

Railway Co. vs. O'Neill, 58 Neb. 239.

Broadwater vs. Foxworthy, 57 Neb. 406.

U. P. R. R. Co. vs. James, 163, U. S. 485.

Backus vs. Fort Street Union Depot Co. 169 U. S. 557.

IV

No exception having been saved to the interlocutory order, directing taxation of the attorney's fees as costs the question could not be reviewed in Nebraska by the Supreme Court. The order having been made without objection or exception on the part of the Insurance Company the order must therefore stand.

Reynolds vs. State, 58 Neb. 49.

Tuomey vs. Wellman, 43 Neb. 28.

Lowrie vs. France, 7 Neb. 191.
Murry vs. School Dist., 11 Neb. 438.
Hosford vs. Stone, 6 Neb. 378.
Morgan vs. State, 51 Neb. 672.

V

We do not wish the Court to misunderstand the condition of this record. The Supreme Court of Nebraska never rendered any opinion in this case. In the Supreme Court for the first time the Insurance Company by its petition in error, assailed the statute now drawn in question. We have pointed out to your Honors that this was entirely too late. Owing to the great increase of business of the Court the legislature of Nebraska two years ago authorized the appointment of nine commissioners who render services similar to referees. Some of their opinions are reported and some are not. The opinion relied on herein was written by one of the commissioners. All that the Court did was to affirm the judgment. Not a word was said about the interlocutory order. It is true that the commissioner or referee in his opinion refers to it but does not say whether he refers to it with reference to State constitution or Feberal constitution. The petition in error assailed the statute as being contrary to both the State and Federal constitution. If the opinion of the Supreme Court of Nebraska was desired on this question it might have been had by a motion for rehearing according to our practice if the Court considered that the Federal

question was in the case. But, your Honors can clearly see that the Insurance Company having waived the question in the County Court and in the District Court and having assented without objection to the order taxing the attorney's fee, could not raise that question in the Supreme Court and there was no Federal question in the case to be disposed of. It has been held by this Court that an order of the judge of a State Court at Chambers can not be regarded as an order of the Court; McKnight vs. James, 155 U. S. 685. The commissioner who wrote the opinion in the question was not even a judge. These commissioners can make no order of any kind. They are simply assistants to the judges and are entirely shorn of all judicial power.

In so far as any supposed variance between the statute in question, and the constitution of Nebraska is concerned, it is an elementary rule that the construction placed by the Supreme Court of Nebraska upon the Nebraska Constitution is binding, and the determination of the Nebraska Court is not subject to re-examination here. Then the opinion of Commissioner Day, says on the subject: "A very able and exhaustive argument has been made by counsel for defendant, assailing this section of the law as unconstitutional and to the mind of the writer, at least, the argument seems to be founded upon good reason. The question, however, can hardly be said to be an open one in this state. The precise question has been decided by this Court and many of the authorities cited in the brief of defendant were considered and reviewed by the court."

We submit that this reference to the constitution must be construed as a reference to the Nebraska constitution alone and not the fourteenth amendment to the Federal constitution.

Kipley vs. Illinois, 170 U. S. 182.

Miller vs. Railroad Company, 168 U. S. 131.

VI.

We submit that on the record here the Insurance Company having waived all objections to this statute in the County Court and in the District Court and having assented to the taxation of an attorney's fee in the District Court and having never raised it until it was raised by the petition in error in the Supreme Court and the question being no where raised by pleading, the Supreme Court of Nebraska on this condition of the record was without jurisdiction to determine the question, the question, was raised too late here.

Railroad Co. vs. Purdy, 185 U. S. 148.

Re Buchanan, 158, U. S. 31.

We are not unmindful of the decision of this Court in Sully vs. American National Bank, 178 U. S. 289. But we think that the case has no application whatever here. In that case the Supreme Court of Tennessee, hearing the case on appeal had authority to modify the decree and pursuant to that authority it did modify the decree of the Court of Chancery; heard the case DE NOVO and disposed of the entire question upon its merits. In Nebraska in an equity action a similar decree may be rendered by our Supreme Court, but it is not so in actions at law. Therefore the Supreme Court of Nebraska would

have no authority to interfere with the judgment of the trial Court in a law action. The error complained of must first have been called to the attention of the trial Court. If this is not done the Supreme Court of Nebraska is powerless to remedy the error. And if the Supreme Court of Nebraska was absolutely without authority to interfere with, or modify the order of the trial Court in taxing this attorney's fee, then this court surely has no such jurisdiction. In the Sully case the constitutionality of the statute was necessarily involved upon the record; the Supreme Court of Tennessee in disposing of the case had to dispose of it on its merits, and in so disposing of it on its merits that Court was called upon in the exercise of its constitutional powers to determine the validity of the Tennessee statute. In the case at bar the Supreme Court of Nebraska was not called upon on the ecord to determine the validity of the Nebraska statute, and what is more the Supreme Court of Nebraska had no constitutional power to determine the question. When the parties by their pleading waived it and thereby settled it themselves, and when the trial Court without protest from either litigant taxed this attorney's fee, its judgment was final and not subject to review.

VII

But if the Nebraska statute authorizing the taxation of an attorney's fee on certain insurance contracts needed defence, we think it may well be defended. The statute drawn in question is as follows; section 43: "Whenever any policy of

insurance shall be written to insure any real property in this state, against loss by fire,tornado or lightening and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages.

Section 44. This act will apply to all policies of insurance hereafter made or written upon real property in this state, and also to the renewal, which shall hereafter be made, of all policies heretofore written in this state, and the contracts made by such policies and renewals shall be construed to be contracts made under the laws of this state.

Section 45. The Court upon rendering judgment against an insurance company upon any such policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs."

The provisions of the statute quoted are part of chapter forty three, that being the chapter of the Nebraska statutes dealing generally with Insurance Companies. It is recognized in Nebraska as elsewhere that insurance corporations are creatures of the law. The power that creates them has the power to regulate them and define their liabilities. The legislature could prohibit them absolutely from doing business in the state

and having the power to prohibit absolutely, the legislature clearly has the power to prescribe the conditions under which an Insurance Company may transact business. The plaintiff in error is a Nebraska corporation and whatever right to do business it possesses it has acquired under the very laws whose validity it now challenges. The statute in question was not by its terms retroactive. It was made to apply only to future policies. This law became a part of the contract in other policies of insurance thereafter issued. That the legislature may prescribe the conditions under which an insurance corporation may do business within a state has been recognized by this court.

Fidelity Mutual Life Association vs. Metler, 185 U. S. 316.

Waters—Pierce Oil Co. vs. Texas 177 U. S. 42.

New York Life Insurance Co. vs. Cravens, 178 U. S. 395.

We rather think that counsel for plaintiff in error, confuses the terms "citizen" and "person" as used in the fourteenth amendment to the Federal constitution. This court has held in several cases that the term "person" includes a corporation. But it is likewise held that the term "citizen," does not include a corporation.

Orient Insurance Co. vs. Daggs, 172 U. S. 557.

Blake vs. McClung, 172 U. S. 239.

Paul vs. Virginia, 8 Wall 168.

The plaintiff in error not being a citizen, within the meaning of the fourteenth amendment to

the constitution of the United States can claim no exemption, privilege, or immunity under that amendment. When it became a corporation it subjected itself to the different provisions and liabilities of the Nebraska statutes. It has subjected itself not only to the provisions of the statute in question, but also to the provisions of the following sections in the same chapter.

SECTION 1. That hereafter, when any number of persons associate themselves togather for the purpose of forming an insurance company, for any other purpose than life insurance, under the provisions of chapter twenty-five of the Revision of 1866, and all acts amendatory and suplementary thereto, they shall publish a notice of such intention once in each week, for four weeks, in some public newspaper in the county in which such insurance company is proposed to be located; and they shall also make a certificate under their hands, specifying the name assumed by such company and by which it shall be known, the object for which said company shall be formed, the amount of its capital stock, and the place where the principal office of said company shall be located, which certificate shall be acknowledged before and certified by some notary public, or clerk of court of record, and forwarded to the auditor of state, who shall submit the same to the attorney-general of state for examination, and if it shall be found by the attorney-general of state to be in accordance with the provisions of this act, and not in conflict with the constitution and laws of the United States and of this state, he shall make certificate of the facts and return it to the auditor of state, who shall reject the name or title applied for by any company when he shall deem the same too similar to any one already appropriated by any other company, or likely to mislead the public. (G. S., 429)

SECTION 2. When the said certificate of the said company shall have received the approval of the attorney of state and auditor of state, the said company shall cause the same to be recorded as now required by law for recording articles of incorporations; and said persons, when incorporated, and having in all respects complied with the provisions of this act, are hereby authorized to carry on the business of insurance, as named in such certificate of incorporation, and by the name and style provided therein, and shall be deemed a body corporate with succession, they and their associates, successors, and assigns, to have the same general corporate powers and be subject to all the obligations and restrictions of said chapter twenty-five of revision of 1860, and of such acts as may be amendatory or supplementary, except as may be herein otherwise provided.

SECTION 3. No joint-stock company shall be incorporated under the provision of this act with a smaller capital than one hundred thousand dollars, nor more than one million dollars, as may be specified in the certificate of incorporation, which stock shall be divided into shares of one hundred dollars each, of which capital at least fifty per cent. shall be fully paid up in cash, and that for the remainder of its capital there are in its possession notes of its stockholders, secured by at least one surety or by mortgages on unincumbered real estate, within this state, worth at least twice the amount of such notes, which notes or other security shall be approved by the state auditor; nor shall any company on the plan of mutual insurance commence business in this state until agreements have been entered into for insurance with at least two hundred applicants, the premiums upon which shall amount to not less than twenty-five thousand dollars of which at least five thousand dollars shall have been paid in actual cash and for the remainder of which notes of solvent parties,

parties founded upon actual and *bona fide* applications for insurance, shall have been received; no one of the notes received as aforesaid shall amount to more than five hundred dollars, and no two thereof shall be given for the same risk or made by the same person or firm, except where the whole amount of such notes does not exceed the sum of five hundred dollars; nor shall any note be regarded or represented as capital stock, unless a policy be issued upon the same within thirty days after the organization of the company taking the same, upon a risk which shall be for no shorter period than 12 months; each of said notes shall be payable, in whole or in part, at any time when the directors shall deem the same requisite for the payment of losses by fire or inland navigation, and such incidental expenses as may be necessary for transacting the business of said company; and no notes shall be accepted as part of such capital stock unless the same shall be accompanied by a certificate of a justice of the peace, notary public, or clerk of the district court of the county in which the person excuting such note shall reside, that the person making the same is, in his opinion, pecuniarily good and responsible for the same, in property not exempt from execution by the laws of their state; and no such note shall be surrendered while the policy for which it was given continues in force.

SECTION 6. It shall be lawful for any insurance company organized under the act, or incorporated under any law of this state, to invest its capital and the funds accumulated in the course of its business, or any part thereof, in bonds and mortgages or unincumbered real estate, within the state of Nebraska, worth double the sum loaned thereon, exclusive of buildings, unless such buildings are insured in some responsible company or companies and the policy or policies transfered to said company, and also in stocks of this state or stocks or

treasury notes of the United States, in the stocks and bonds of any county or incorporated city in this state, which may have been therefore authorized to be issued by the legislature of this state, and to lend the same, or any part thereof on the security of such stock, or lands, or treasury notes, or upon bonds and mortgages as aforesaid, and not otherwise; and to change and reinvest the same in like securities, as occasion may from time to time require; but any surplus money over and above the paid up capital stock of any such company organized under this act or incorporated under any law of this state may be invested in or loaned upon the pledge of public stocks, or bonds of the United States or of any one of the states, or stocks, bonds, or evidences of indebtedness of any solvent, dividend-paying institution incorporated under the laws of this state, or of the United States, except their own stock; *Provided Always*. That the current market value of such stock, bonds. or other evidence of indebtedness shall be at all times, during the continuance of such laws, at least twenty per cent. more than the sum loaned thereon.

SECTION 7. Upon receiving notification that the requirements of the preceding sections have been complied with, the auditor of state shall make an examination, or cause one to be made by some disinterested person officially appointed by him for that purpose, and if it shall be found (if the examination shall be made other than (by) the auditor, then the finding shall be certified under oath) that the capital herein required of the company named, according to the nature of the business proposed to be transacted by such company, has been paid in and possessed by it in money, or in such stocks, notes, bonds, or mortgages as are required by the third and sixth sections of this act, then he shall so certify; and if the examination be made by other than the auditor, then the finding shall be certified under oath; or, if

it is proposed to be a mutual insurance company, that it has received and is in possession of the capital, premiums, or *bona-fide* engagements of insurance, or the securities, as the case may be, to the extent and value required by the third and sixth sections of this act, the name and residence of the maker of each premium note forming part of the capital of any such proposed mutual insurance company, and the amount of such note shall be returned to the auditor. The corporators or officers of such company or proposed company contemplated by this act shall be required to certify under oath, to the auditor of state, that the capital exhibited to the person making the examination directed in this section was *bona-fide* property of the company so examined; the certificates above contemplated shall be filed in the office of said auditor, who shall thereupon deliver to such company a certified copy of the same, with his written permission for them to commence business as proposed in their written certificate of incorporation, which, on being placed on record in the office of the recorder of the county in which the company is to be located, by the recorder, in a book prepared by him for that purpose, shall be their authority to commence business and issue policies; and such certified copy of said certificate may be used in evidence for or against said company with the same effect as the originals.

SECTION 8. It shall be lawful for any company organized under this act, or doing business in this state: *First*—To insure houses, buildings, and all other kinds of property against loss or damage by fire or other casualty, and to make all kinds of insurance on goods, merchandise, or other property in the course of transportation, whether on land or water, or any vessel afloat, wherever the same may be. *Second*—To make insurance on the health of individuals, and against the personal injury, disablement, and death, resulting from traveling or general accidents by land or water. *Third*—To guarantee or

insure the fidelity of persons holding places of public and private trust and to become surety on bonds and obligations of persons and corporations and to become surety on any bond, recognizance, or other writing in the nature of a bond in the same manner that natural persons may do so, subject to all the rights and liabilities of such persons. *Fourth*—To receive on deposit and insure the safe keeping of books, papers, monies, stocks, bonds, and all kinds of personal property. *Fifth*—To insure horses, cattle, and other stock against loss or damage by accident, theft, or any unknown or contingent event whatever which may be the subject of legal insurance; to lend money on bottomry or respondentia, and to cause itself to be insured against any loss or risk it may have incurred in the course of its business and upon the interest which it may have in any property by means of any loan or loans which it may have made on mortgage, bottomry, or respondentia; and generally to do and perform all other matters and things proper to promote these objects; *Provided*. That no companies shall be organized to issue policies of insurance for more than one of the above five mentioned purposes; and no company that shall have been organized for either one of said purposes, shall issue policies of insurance for any other; and no company organized under this act, or transacting business in this state, shall expose itself to loss on any one risk or hazard to an amount exceeding ten per cent. on its paid-up capital, unless the excess shall be re-insured by the same in some other good and reliable company; *And Provided*, That the restriction as to the amount of risk any company shall assume shall not apply to companies organized to guarantee the fidelity of persons in places of public or private trust, nor to companies that receive on deposit and gurantee the safe keeping of books, papers, moneys, and other property. (Amended 1901, chap. 39)

SECTION 12. All policies of contracts of insurance made or entered into by the company may be made either with or without the seal of said company; but said policies shall be subscribed by the president or such other officer as may be designated by the directors for that purpose, and shall be attested by the secretary thereof.

SECTION 15. It shall not be lawful for the directors, trustees, or managers of any insurance company organized under this act, or incorporated under any law of this state to make any dividends except from the surplus profit arising from their business, and in estimating such profits there shall be reserved refrom a sum equal to forty per cent. of the amount received as premiums on unexpired risks and policies, which amount so reserved is hereby declared to be unearned premiums; and there shall also be reserved all sums due the corporation on bonds and mortgages, bonds, stocks, and book accounts of which no part of the principal or interest thereon has been paid duing the year preceding such estimate of profits, and upon which suit for foreclosure or collection has not been commenced, or which, after judgment has been obtained thereon, shall have remained more than two years unsatisfied, and upon which interest shall not have been paid; and in case of such judgment, the interest due or accrued thereon and remaining unpaid shall also be reserved. Any dividends made contrary to these provisions shall subject the company making it to a forfeiture of their charter.

SECTION 19. Every insurance company hereinafter organized as provided in this act, shall,if it be a mutual company, embody the word "mutual" in its title, which shall appear upon the first page of every policy, and renewal receipt; and every company doing business as a cash stock company, shall, upon the face of its policies, express in some suitable manner that such policies were issued by stock companies.

SECTION 20. It shall be the duty of the president or of the vice-president and secretary of each company organized under this act, or incorporated under any law of this state, or doing business in this state, annually, on the first day of January of each year, or within thirty days thereafter, to prepare under oath and deposit in the office of the auditor of state, a full, true, and complete statement of the condition of such company on the last day of the month preceding that in which such statement is filed, which last statement shall exhibit the following items and facts in the following form, viz: *First.* The amount of capital stock of the company. *Second.* The name of the officers. *Third.* The name of the company, and where located. *Fourth* The amount of capital stock paid up. *Fifth.* The property or assets held by the company specifying the value as near as may be of the real estate owned by such company. The amount of cash on hand and deposited in banks to the credit of the company, and in what bank the same is deposited. The amount of cash in the hands of agents, and in course of transmission. The amount of loans secured by first mortgages on real estate, with the rate of interest thereon, specifying the location of such real estate, and its assessed valuation. The amount of other bonds and loans, and how secured with the rate of interest thereon. The amount due the company on which judgment has been obtained. The amount of stocks of this state, of the United States, of any incorporated city of this state, and of any other stock owned by the company, specifying the amount, numbers of shares, and par and market value of each kind of stock. The amount of stock held by such company as collateral security for loans, with amount loaned on each kind of stock, its par and market value. The amount of assessments on stock and premium notes paid and unpaid. The amount of interest actually due and unpaid. All other securities and their value. The

amount for which premium notes have been given, on which policies have been issued. *Sixth.* The liabilities of such company, specifying the losses adjusted and due. Losses adjusted and not due. Losses unadjusted. Losses in suspense, and the cause thereof. Losses resisted and in litigation. Dividends either in script or cash specifying the amount of each declared, but not due. Dividends declared and due. The amount required to reinsure all outstanding risks on the basis of forty per cent. of the premium on all unexpired risks. The amount due banks or other creditors. The amount of money borrowed and the securities therefor. All other claims against the company. *Seventh*—The income of the company during the previous year, specifying the amount received for premiums exclusive of premium notes; the amount of premium notes received; the amount received for interest; the amount received for assessment calls on stock or notes, or premium notes. The amount received from all other sources. *Eighth*—The expenditures during the preceding year, specifying the amount of losses paid during said term, stating how much of the same accured prior and how much subsevuent to the date of the preceding statement, and the amount at which losses were estimated in such preceding statement. The amount paid for dividends. The amount paid commissions, salaries, expenses, and other charges of agents, clerks, and other employees. The amount paid for salaries, fees, and other charges of officers and directors. The amount paid for local, state national internal revenue, and other taxes and duties. The amount paid for all other expenses, expenditures, including printing, stationery, rents, furniture, etc. *Ninth*—The largest amount insured in any one risk. *Tenth*—The amount of risks written during the year then ending. *Eleventh*—The amount of risks in force having less than one year to run. *Twelfth*—The amount of risks in

force having more than one and not over three years to run. *Thirteenth*—The amount af risks having more than three years to run. *Fourteenth*—The following question must by answered, viz: Are dividends declared on premiums received for risks not terminated? The auditor of state shall withhold the certificate of authority from any such company neglecting or failing to comply with the provisions of this section.

SECTION 21. The auditor of state is hereby authorized and empowered to address any inquiries to any insurance company in relation to its doings and condition, or any other matter connected with its transactions which he may deem necessary for the public good, or for a proper discharge of his duties; and it shall be the duty of any company so addressed to promptly reply in writing there to.

SECTION 24. It shall not be lawful for any agent or agents or individual to act for any insurance company or companies referred to in this act, directly or indirectly, in taking risks or transacting business of insurance in this state, without procuring from the auditor of state a certificate of authority stating that such company has complied with all the requisitions of this act.

SECTION 26. Every insurance company organized under the laws of or doing business in this state shall conform to all the provisions of this act, applicable there to, on or before the first day of April 1873; and when necessary, any existing company shall change its charter and by-laws so as to conform hereto, by a vote of a majority of its board of directors, and any president, secretary, or other officer of any company organized under the laws of Nebraska, or any officer or person doing or attempting to do business in this state for any insurance company organized without this state, failing to comply with any of the requirements of this act, or violating any

of the provisions thereof, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars and be imprisoned in the county jail for a period of not less than thirty days, nor more than six months.

SECTION 28. It shall be the duty of the auditor of state, whenever he shall deem it expedient so to do, in his judgment, to appoint one or more persons, not officers, agents or stockholders of any insurance company doing business in this state, to examine into the affairs and condition of any insurance company incorporated or doing business in this state, or to make such examination himself; and it shall be the duty of the officers or agents of such company or companies to cause their books to be open for the inspection of the auditor or the person or persons so appointed, and otherwise facilitate such examination so far as may be in their power to do; and for the purpose of arriving at the truth in such cases, the auditor, or the persons so appointed by him, shall have power to examine, under oath, the officers or agents of any company or others, if necessary, relative to the business and condition of said company; and whenever the auditor shall deem it best for the interest of the public so to do, he shall publish the result of such investigation in one or more papers of this state; and whenever it shall appear to the said auditor, from such examination, that the assets and funds of any company incorporated in this state are reduced or impaired by the liabilities of said company, as described under the head of liabilities in the statement required by this act, more than twenty per cent. below the paid up capital stock required by this act, he may direct the officers thereof to require the stockholders to pay in the amount of such deficiency within such a period as he may designate in such requisition; or he shall communicate the fact to the attorney of state, whose duty it shall then become to ap-

ply to the district court, or, if in vacation, to one of the judges thereof, for an order requiring said company to show cause why their business should not be closed, and the court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it shall appear to the satisfaction of said court or judge that the assets and funds of said company are not sufficient as aforesaid, or that the interests of the public require it, the said court or judge shall decree a dissolution of said company, and a distribution of its effects; the said court or judge shall have power to refer the application of the attorney of state to a referee, to inquire into and report upon the facts stated herein.

SECTION 29. Any company receiving the aforesaid requisition from the said auditor shall forthwith call upon its stockholders for such amounts as will make its paid up capital equal to the amount filed by this act or the charter of said company; and in case any stockholder shall refuse or neglect to pay the amount so called for, after notice personally given, or by advertisement, in such time and manner as said auditor shall approve, it shall be lawful for the said company to require the return of the original certificates of stock held by such stockholder, and in lieu thereof, to issue new certificates for such number of shares as the said stockholder may be entitled to, in the proportion that the ascertained value of the funds of the said company may be found to bear to the original capital of the said company, the value of such shares for which new certificates shall be issued to be ascertained under the direction of the said auditor, the company paying for the fractional parts of shares. And it shall be lawful for the directors of such company to create new stock, and dispose of the same, and to issue new certificates therefor, to an amount sufficient to make up the original capital of the company

and in the event of any additional losses, accruing upon new risks taken on the expiration of the period limited by the said auditor, in the aforesaid requisition for the filling up of the deficiency in the capital of such company, and before said degciency shall have been made up, the directors shall be individually liable to the extent thereof.

SECTION. 34. It shall be the duty of every insurance company of the kind provided in this act, doing business in this state, organized under the laws of this state or any other state or country, to publish once, annually, in two newspapers of general circulation, one of which newspapers shall be published at the capital of the state (and in case of companies organized in the state of Nebraska, one of which shall be published in the county where the principal office is located,) a certificate from the auditor of state that such company has in all respects complied with the laws of this stase relating to insurance.

The experience of the people of Nebraska with Insurance Companies was such as to lead the legislature to believe that the adoption of the statute drawn in question was necessary. It was made to apply only to insurance upon buildings. The prime object was to protect the health and welfare of the people. The case at bar may be used to illustrate the wisdom and necessity of such a law. The building destroyed and insured was the dwelling house of the defendant in error and his family, payment was resisted upon grounds entirely unjustifiable. The plaintiff in error refused to pay the loss and Mr. Dobney was a man of but small means in a newly settled and sparcely settled prairie country. His home was destroyed and he was without money

to rebuild. He and his family had to tent it out or do the best they could until some means could be secured to build some kind of a home that might be a shelter for his family. If the money could be immediately procured a home might be promptly built, but if settlement was delayed the family might be exposed to hardships and for a lack of a comfortable home their health or even their lives might be endangered. A large portion of Nebraska has very few tenement houses. A man must own his own house or do without. If he is burned out he can not rent a house in the neighborhood, but has to live in a tent or barn or a "dug out." By living in this way he or his family may contract disease, and it is within the power of the legislature by all reasonable legislation to protect the health of the people against disease and suffering. The hardship and suffering endured by defendant in error and his family by reason of the failure of the plaintiff in error to pay this loss is in itself a forcible argument in favor of the wisdom of the statute. The reasons for the adoption of this statute are certainly as strong as the reasons advanced by this Court for sustaining the Texas statute, in Fidelity Mutual Life Association vs. Mettler, Supra. The decision in that case to the mind of the writer is conclusive in this. We think the doctrine of that case is eminently sound and the reasoning unanswerable.

The right of the Nebraska Legislature to en-

act the statute in question is fully recognized, by implication at least, by this court in the following cases:

Insurance Company vs. Warren, 181, U. S. 73.

Orient Insurance Company vs. Daggs, 172 U. S. 557.

Railroad Company vs. Mathews, 174 U. S. 96.

Respectfully submitted,

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February 25, 1903.